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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 967

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Petitioner,

vs.

ARTHUR S. RIEGER,

Respondent.

PETITIONER'S REPLY BRIEF

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It would scarcely be possible for petitioner to drive home the point which it is urging here more effectively than respondent himself has done by appendix B to his brief. In this he reproduces his own answers to the pre trial interrogatories by which defendant tried to find out of what it was accused. The following are the "acts" of negligence which plaintiff was then (pre trial) claiming; these are paraphrased below in the interests of clarity and references to the record upon the same subject immediately follows each. Specifications of negligence (the only ones that have ever occurred, and none has ever occurred since the evidence was taken) are as follows:

1. Negligence in the maintenance or operation of the power crab.

THE EVIDENCE ON THIS: Plaintiff testified that the equipment was in exactly the same condition as when acquired (new) by the railroad, except ordinary wear and tear (R. 30-31). At no time did he claim anything to be the matter with the power crab.

2. Negligence in failure to furnish a safe place to work.

THE EVIDENCE ON THIS: Plaintiff testified that he was occupying the very place which he himself had shoveled clear (R. 23).

3. Negligence in failing to furnish adequate help.

THE EVIDENCE ON THIS: Plaintiff testified that he felt that they had enough men, and that it was his judgment that the four men on the timber could sustain it in the manner that they had always done; he never asked anyone for any help. (R. 30).

4. Negligence in ordering plaintiff to work under conditions known to be dangerous.

THE EVIDENCE ON THIS: Plaintiff himself selected the place where he was, and stated that the only reason he did not stand in a place which was in the clear was because of his own habit (R. 27-28).

5. Negligence in the design and construction of the power crab.

THE EVIDENCE ON THIS: Plaintiff testified nothing adverse to the design or construction of the crab, but did call as an expert a professor of mechanical engineering who testified that the "design of this equipment is okay" (R. 38).

6. Negligence in "requiring plaintiff to stand between a pile of stringers and a stringer suspended from the power crab * * *"

THE EVIDENCE ON THIS: As already indicated, plaintiff selected the place himself and testified that "there was nothing there to keep me from standing on the easterly end" (which would have been in the clear from the timber).

7. Negligence in that the braking device on the power crab failed to hold.

THE EVIDENCE ON THIS: There is no evidence whatever at any place of any failure on the part of the braking device on the crab to hold.

Since the trial, respondent-plaintiff has now thought up two other assertions of negligence, which appear in respondent's brief although not in the pre-trial answers to interrogatories.

8. Negligence in failing to spread sand or cinders on the ground.

THE EVIDENCE ON THIS: Plaintiff was standing on the very ground that he himself had shoveled clear of snow (R. 28). The ground surface at this place was cinders and gravel (R. 33); and there is no suggestion in the record that adding more to the cinders and gravel already there would have altered the course of events to the slightest degree.

9. Negligence in failing to use rollers.

THE EVIDENCE ON THIS: Rollers have occasionally been used (R. 59); but where or why or for what purpose was never developed; nor was there any reason to be

lieve that the failure to use them played any part, even the slightest, in the occurrence of the accident (R. 59).

The Court of Appeals speaks of the furnishing of answers to these interrogatories as being an answer to the complete failure of the trial court to define the actual issues; but this court will note that these answers were pre-trial, and merely expressed what the plaintiff hoped to be able to prove. He actually failed in proof as to every one of them.

This brings us back to the question of what the trial court really did submit. If it was the points mentioned above, taken mainly from plaintiff's own answers to interrogatories, then it was wholly unsupported by the evidence and in fact contradicted at almost every turn by plaintiff's own testimony. Moreover, the jury, like counsel for defendant, was never told that these were the points which were involved and upon which the jury would be permitted to decide whatever it was to decide. If these were not the points, and the evidence shows they were not, then there was no definition whatever as to what was involved, and nothing upon which an appropriate argument to the jury could possibly be based.

Respondent's position here appears to be that, even after the evidence is closed, the issues of the case are still to be controlled by the parties' own answers to pre-trial discovery interrogatories, rather than by the evidence in the case. It is upon this unique proposition that the respondent appears to be attempting to defend the decision below: a proposition made bizarre by the fact that the interrogatory answers were never submitted to the jury.

This case involves not merely a question of whether the evidence does or does not sustain a particular jury verdict, but a question of basic fundamentals: the right of a party

to have a fair trial on issues made out by evidence in the case, and sufficiently defined so a litigant's rights can be properly protected.

In a Federal Employer's Liability Act case such as this, the jury is the supreme and final judge of the facts. Both parties have the right to have that jury properly instructed on the issues of the case. Both parties, not just one of them, have the right to make a closing argument to the jury when both the jury and counsel know what the issues are. If anything is fundamental in the Anglo-Saxon system of jurisprudence, is it the right to a fair trial on sufficient notice to enable a party to handle his own defense; and this, in this case, did not occur.

Respectfully submitted,

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